Tentative Rulings for April 30, 2019
Departments 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG03440 ***Solis v. Ybarra*** **(Dept. 403)**

18CECG00731 ***Interadvisory, LTD v. Dolarian Capital, Inc.*** **(Dept. 503)**

17CECG02773 ***Hagopian v. Morrissey*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(2)

Tentative Ruling

Re: ***In re Tessa Renee Splan***
Superior Court Case No. 19CECG00474

Hearing Date: April 30, 2019 (Dept. 403)

Motion: Petition to Compromise Claim

Tentative Ruling:

To grant. The proposed trust is approved. Petitioner must submit an order approving the compromise for signature.

The Court notes that the accountings referred to in section 6.12 of the trust are to be presented to the Probate division of the Superior Court.

Pursuant to Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/29/19 .
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Tessa Renee Splan***
Superior Court Case No. 19CECG00483

Hearing Date: April 30, 2019 (Dept. 403)

Motion: Petition to Compromise Claim

Tentative Ruling:

To grant. The proposed trust is approved. Petitioner must submit an order approving the compromise for signature.

The Court notes that the accountings referred to in section 6.12 of the trust are to be presented to the Probate division of the Superior Court.

Pursuant to Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/29/19 .
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Campos v. Nino et al.***
Superior Court Case No. 18CECG00490

Hearing Date: April 30, 2019 (Dept. 403)

Motion: Compel defendant/cross-defendant to provide initial responses to request for production of documents, set one, deem request for admissions, set one, admitted and for monetary sanctions

Tentative Ruling:

The Court notes that the moving party scheduled and paid for 1 motion. The moving party has filed 2 combined in one set of papers. Moving party must pay an additional $60 fee to the Court. Payment should be made within 30 days after service of this order.

To grant defendant/cross-complainant's motion that the truth of the matters specified in the request for admission, set one, be deemed admitted as to defendant/cross-defendant David Nino unless defendant/cross-defendant serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant defendant/cross-complainant's motion to compel defendant/cross-defendant David Nino to provide initial verified responses to request for production of documents, set one. Code of Civil Procedure § 2031.300, subd. (b). Defendant/cross-defendant David Nino to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant defendant/cross-complainant's motion for monetary sanctions. David Nino is ordered to pay $530 in sanctions to McCormick, Barstow, Sheppard, Wayte & Carruth, LLP within 30 days after service of this order.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/29/19 .
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Gutierrez et al. v. Capot et al.***
Superior Court Case No. 17CECG00314

Hearing Date: April 30, 2019 (Dept. 403)

Motion: Petition to Compromise Disabled Adult's Claim

Tentative Ruling:

The court approves the settlement of $142,000 with costs of $2,014.41 to be paid from the settlement. In addition the court awards attorney's fees in an amount of $46,661.86. This results in $93,323.73 going to the special needs trust established for Marilyn Marie Iverson in Probate case 19CEPR00194. The order is signed. The hearing of off calendar.

Pursuant to Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/29/19 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Avila v. Crinklaw Farm Services, Inc., et al.***
Superior Court Case No. 17CECG03823

Hearing Date: April 30, 2019 (Dept. 403)

Motion: Defendant's Motion for Summary Judgment/Adjudication

Tentative Ruling:

To deny summary judgment. (Code Civ. Proc. § 437c(c).) To grant summary adjudication in favor of defendant of the first, second, fourth, fifth, sixth, seventh, ninth, tenth, twelfth, thirteenth, fourteenth, seventeenth causes of action. To deny summary adjudication of the third, eighth, eleventh, fifteenth, sixteenth and eighteenth causes of action. (Code Civ. Proc. § 437c(f)(1).)

Explanation:

Plaintiff asserts 18 different employment-related claims, including discrimination, harassment, retaliation, and wage and hour claims. As pointed out in the moving papers, plaintiff made many admissions at his deposition that were devastating to most of his claims.

The court notes that the moving papers primarily rely on plaintiff's deposition testimony, which is attached as Exhibit A to the declaration of Steven Crass. However, the copy of the declaration filed with the court has no content, skipping from the caption page straight to the exhibit. The page with the content of the declaration appears to have been inadvertently omitted from the copy filed with the court. Accordingly, the deposition transcript is not authenticated. It appears that the sole function of the declaration was to authenticate the deposition transcript. (See UMF 1.) As plaintiff raises no objection, it appears that plaintiff was served with a full copy of the declaration. In light of the fact that plaintiff has not objected and apparently concedes the authenticity of the deposition transcript based on his own reliance on the deposition, the court will consider the declaration. Evidence not objected to may be relied on by trial court, even if otherwise inadmissible. (*Weil v. Fed. Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 149 fn 9.)

Though defendant moves for summary adjudication of all 18 causes of action, plaintiff only opposes the motion as to the third, eighth, eleventh, twelfth, fifteenth, sixteenth, eighteenth causes of action. The other causes of action are not mentioned at all in the opposition memorandum or responsive separate statement.

When a moving party makes the required prima facie showing, the opposing party's failure to comply with this requirement may, in the court's discretion, constitute a sufficient ground for granting the motion. (Code Civ. Proc. § 437c(b)(3); see *Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170 Cal.App.4th 554, 568.) As plaintiff has offered no opposition, and failed to file a responsive separate statement, summary

adjudication will be granted for the reasons stated in the moving papers as to all but the third, eighth, eleventh, twelfth, fifteenth, sixteenth, eighteenth causes of action.

Third cause of action

The third cause of action is for discrimination based on physical disability. The complaint alleges that plaintiff was harassed based on his … physical disability and/or medical condition based on injuries he suffered at work …" (See Complaint ¶ 5.) Plaintiff alleges that he had a hereditary migraine condition called "auras." (Compliant ¶ 8.)

Defendant first argues that plaintiff does not have a disability.

The definition of "Physical disability" includes, in pertinent part,

> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
> (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
> (B) Limits a major life activity. For purposes of this section:
> (i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
> (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.
> (iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(Gov. Code § 12926(m).)

Regulations exclude conditions that have little or no residual effects, "such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders." (2 CCR § 11065(d)(9)(B).)

Defendant argues that though plaintiff self-characterizes his headaches as "migraines" they only occurred on three occasions and had no "residual effect." At most, Plaintiff allegedly suffered from three bad headaches versus anything chronic or diagnosable.

However, none of this is in defendant's separate statement. Defendant's separate statement includes no information about plaintiff's claimed disability.

Every motion for summary judgment must be accompanied by a "separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed." (Code Civ. Proc. § 437c(b)(1).) The separate statement

must separately identify each cause of action **and each supporting material fact claimed to be without dispute** with respect to that cause of action. (Cal. Rules of Court, Rule 3.1350(d), emphasis added.) "This is the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, it does not exist." (*United Comm. Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) If the separate statement fails to indicate all necessary facts, the judge need not read the supporting declarations and other evidentiary documents. (See *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 740.)

Inasmuch as defendant's separate statement does not address whether plaintiff suffered from a disability, the court declines to consider this argument or ground for the motion. Furthermore, the sole basis for claiming that plaintiff did not have a disability is that the migraines happened just three times. (MPA 6:22-23.) But the moving papers include no evidence relating to plaintiff's migraines and history thereof, or any relevant authorities regarding whether migraines can constitute a disability, or how many must be experienced before they qualify as a disability. Defendant has not met its burden on this issue.

The only facts defendant's separate statement regarding the third cause of action are those pertaining to the reason for the termination: plaintiff was let go due to the lower volume of work available. (UMF 4-6.)

It is plaintiff's burden to establish that defendant engaged in intentional discrimination. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 353-356; *Heard v. Lockheed Space & Missiles Co.* (1996) 44 Cal.App.4th 1735, 1748.) If plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. *(Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 889.)

Defendant relies on the declaration of Angelica Gutierrez, defendant's operations manager. She explains that plaintiff worked as a tractor driver for defendant for approximately six months between 2014 and 2016. Plaintiff's job was seasonal and sporadic. He worked during the 2014, 2015 and 2016 harvest seasons. Typically, defendant employs seasonal workers on an "as-needed basis." (Gutierrez Dec. ¶ 3.) Gutierrez explains that "[i]n 2016, Plaintiff was no longer employed by CFS because the volume of work subsided and CFS no longer needed Plaintiffs services." (Gutierrez Dec. ¶ 4.) "In fact, in August 2016, CFS stopped employing several individuals, Plaintiff among them, due to the lower volume of work available." (Gutierrez Dec. ¶ 5.)

However, the declaration fails to even claim that the termination was not actuated by discriminatory bias. "Invocation of a right to downsize does not resolve whether the employer had a discriminatory motive for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release. Where these are issues, the employer's explanation must address them." (*Guz v. Bechtel nat. Inc.* (2000) 24 Cal.4th 317, 358, citing *Throgmorton v. U.S. Forgecraft Corp.* (8th Cir.1992) 965 F.2d 643, 646–647.)

A lower volume of work cannot be used as an opportunity to get rid of an employee with a disability. Gutierrez offers a business reason for the termination. But plaintiff specifically could have been chosen for termination, as opposed to some other employee, because of his alleged disability. Because Gutierrez fails to address the alleged unlawful motive for terminating plaintiff, the burden does not shift to plaintiff to offer evidence that the proffered reason was pretextual. It is not necessary to consider plaintiff's evidence that he had a disability and that the disability was a substantial motivating reason for the termination.

Eighth cause of action

The eighth cause of action is for failure to stop discrimination and harassment from occurring. The motion is premised on the contention that plaintiff did not complain about discrimination, and therefore defendant could not take steps to prevent discrimination of which it was not aware.

However, the only authorities cited do not support this as a ground for the motion. The authorities cited by defendant are to the point that there is no claim for failure to prevent harassment or discrimination when no harassment or discrimination occurred. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289; *Kelley v. The Conca Companies* (2011) 196 Cal.App.4th 191, 208.)

As discussed in connection with the third cause of action, defendant fails to meet its burden as to the discrimination claim. Accordingly, there is no basis under the authorities cited to grant summary adjudication as to the failure to stop discrimination from occurring.

Eleventh cause of action

The eleventh cause of action is for wrongful termination in violation of public policy. The sole ground raised as to this cause of action is that all other causes of action fail. Since the motion is being denied as to the third and eighth causes of action, the motion should be denied as to the eleventh cause of action as well.

Twelfth cause of action

The twelfth cause of action is for intentional infliction of emotional distress.

The motion is first premised on the contention that this cause of action is derivative of all other claims and therefore also fails as a matter of law. The motion obviously should not be granted on that ground.

That is the only ground on which the motion is opposed as to this cause of action.

However, the motion also argues that plaintiff fails to satisfy the elements of an IIED claim. These elements are: 1) extreme and outrageous conduct by defendant; 2) intention to cause or reckless disregard of causing emotional distress; 3) the plaintiff

must actually suffer severe emotional distress; and 4) actual and proximate causation. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.)

Defendant addresses only specifically the first and third elements.

In order to meet the first element of "extreme and outrageous conduct," Plaintiff must prove that the conduct in question was "so extreme and outrageous as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Alcorn v. Anbro Eng., Inc.* (1970) 2 Cal.3d 493, 499, n. 5.) Workplace discipline and criticism are a normal part of the employment relationship, as well as the expectation that a superior may use a gruff, abrupt, and intimidating communication style. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25.)

The motion will not be granted on this ground. The separate statement should clearly identify all conduct that plaintiff claims to be extreme and outrageous. Typically this would be done by citing to the pleadings and providing plaintiff's discovery responses in which he was asked to specifically identify all such conduct. But defendant did not do this. Defendant's separate statement includes nothing regarding what plaintiff claims to constitute extreme and outrageous conduct. Defendant fails to meet its threshold burden of negating the first element of the IIED claim.

Defendant also attacks the third element of severe emotional distress.

This distress must be so substantial that a reasonable person in a civilized society should be expected to bear it. (CACI 160.) Mere "[d]iscomfort, worry, anxiety, upset stomach, concern, and agitation" are not sufficient. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.)

Two UMF are devoted to this issue: "Plaintiff testified that since leaving CFS employ, he has not had any *physical* problems whatsoever." (UMF 26, emphasis added.) And "[p]laintiffs only emotional distress is the occasional sleepless night, worries about bills and his father's health." (UMF 27.) These facts are supported by the evidence cited, and are sufficient to shift the burden to plaintiff.

Plaintiff claims that he testified that he had emotional problems as a result of his time at CFS and this effects him physically, referencing pages 128:5-129:3 of his deposition. However, the referenced deposition testimony says no such thing. Defendant's characterization of plaintiff's testimony is accurate. Plaintiff has failed to raise a triable issue of fact as to this element. Defendant having negated this element, summary adjudication should be granted as to the twelfth cause of action.

Fifteenth cause of action

The fifteenth cause of action is for failure to pay meal and rest period compensation.

Defendant points out that Labor Code § 512 requires employers to provide an off-duty 30-minute meal period after no more than five hours of work and a second 30-minute meal period after no more than ten hours of work. Wage Order No. 14 similarly

provides: "Every employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee." (Wage Order 14, ¶ 11.)

The moving papers point out that plaintiff admitted that "every day we worked, we would eat... [for] 30 minutes." (UMP 23.) Plaintiff also stated that "every day we worked, we would always take our lunch, but about two or three times [it] was less than the half an hour." (UMF 24.)

Regardless of whether there is a viable cause of action for failure to provide meal periods, and compensation for missed meal periods, the cause of action also alleges failure to provide rest period compensation, an issue not addressed in the moving papers. Summary adjudication can be granted where it completely disposes of the cause of action. (Code Civ. Proc. § 437c(f)(1).) As defendant failed to address the component of the cause of action based on failure to pay rest period compensation, the motion should be denied as to the fifteenth cause of action.

Sixteenth cause of action

The sixteenth cause of action is for failure to furnish timely and accurate wage and hour statements. Defendant asserts without reference to the Complaint that this cause of action is based on defendant's alleged failure to pay for all time worked. Thus, defendant concludes, this claim is entirely derivative of plaintiffs' prior causes of action, and should be dismissed since Defendant is entitled to summary adjudication on those claims.

Aside from the fact that certain causes of action survive the motion, including the fifteenth, in the Complaint the cause of action is not so limited as characterized by defendant. The Complaint alleges:

> Defendant failed to provide Plaintiff with timely and accurate wage and hour statements showing gross wages earned, total hours worked, all deductions made, net wages earned, all applicable hourly rates in effect during each pay period, and the corresponding number of hours worked at each hourly rate by her.

(Complaint ¶ 128.)

The motion should be denied as to this cause of action because defendant fails to show that the cause of action as pled has no merit.

Eighteenth cause of action

The eighteenth cause of action is for waiting time penalties for failure to pay accrued wages and other compensation due to him immediately upon his termination.

As to this cause of action the motion is premised on the contention that plaintiff admitted he was paid for all time worked, and he received all his meal and rest

periods. However, the evidence cited does not establish this, and the moving papers and evidence fails to address rest periods. (See UMF 21-25.) The motion should be denied as to this cause of action.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 4/29/19 .
(Judge's initials) (Date)
)

Tentative Rulings for Department 501

(30)

Tentative Ruling

Re: ***Erick Like v. Sorento Holdings LLC***
Superior Court Case No. 18CECG00805

Hearing Date: ***If oral argument is timely requested on April 29th between the hours of 3:00 – 4:00 p.m., it will be held on Thursday*** May 2, 2019 @ 3:00 p.m. (Dept. 501)

Motions: Travelers Casualty Insurance Companies' motion for leave to file a complaint-in-intervention

Tentative Ruling:

To grant. Travelers Casualty Insurance Company must file its complaint-in-intervention within 5 days of service of the minute order.

Explanation:

Upon timely application, any person who has an interest in a matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. (Code Civ. Proc. § 387; *Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 303-305.) The intervention must not enlarge the issues in the case and the reasons for intervention must outweigh any opposition by the existing parties. (Code Civ. Proc. § 387*; Truck Ins. Exch. v. Sup.Ct.* (1997) 60 Cal.App.4th 342, 346; *Reliance Ins. Co. v. Sup.Ct.* (2000) 84 Cal.App.4th 383, 386; see also *Marriage of Kerr* (1986) 185 Cal.App.3d 130, 134.)

Here, the facts support intervention. First, Travelers has a direct and immediate interest in the outcome of the litigation. Travelers carried 3391 Scarboro Street LLC's liability insurance when the cause of action arose, so it will be obligated to pay any judgment rendered against Travelers. This, together with the fact that 3391 Scarboro Street LLC cannot defend itself, provides Travelers a direct interest. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 216 [where a suspended corporation has been sued, its liability insurer may intervene and defend on the corporation's behalf].)

The reasons for intervention also outweigh any opposition by the existing parties. Intervention will not impede the principal suit, require a reopening of the case for further evidence, delay the trial of the action, or change the position of the original parties. Travelers seeks only to step into the shoes of its insured – not to expand the issues. This case is also fairly young; it was filed on March 6, 2018, and trial is set until October 7, 2019. So there is still plenty of time for discovery and law and motion. And the motion is unopposed, so no evidence is presented to show that intervention will cause a change in the position of the original parties.

Finally, the motion is timely. A motion to intervene may be made at any time during the course of the action – even after judgement – if the court, in its discretion, finds the motion was timely. (See *e.g., Mallick v. Sup. Ct*. (1979) 89 Cal.App.3d 434, 437.) And in the case at bar, Travelers it sought the court's permission to intervene "at the earliest opportunity."

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/29/2019 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: ***In re Melany Baeza***
Superior Court Number: 19CECG01027

Hearing Date: April 30, 2019 (Dept. 502)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny without prejudice. Petitioner must file a new petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition contains insufficient information from which the Court can determine that the settlement is in the minor's best interest. The petition indicates that the setting party had a policy with $30,000/$15,000 in coverage. The petition indicates that there are 3 children each receiving $5,000. The petition fails to explain why the rest of the insurance proceeds are not being distributed. The petition fails to explain that either $5,000 is an appropriate settlement amount for the wrongful death of the minor's father based upon the level of liability of the settling party or that the settling party is judgment proof beyond the policy limits.

The customary reasonable attorney's fees in a petition to compromise the minor's claim are 25% of the net settlement (gross settlement minus costs). In the current petition the attorney seeks 25% of gross. There is nothing about this case that warrants this increased fee amount.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4-29-19.
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Destiny Baeza***
Superior Court Number: 19CECG01028

Hearing Date: April 30, 2019 (Dept. 502)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny without prejudice. Petitioner must file a new petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition contains insufficient information from which the Court can determine that the settlement is in the minor's best interest. The petition indicates that the setting party had a policy with $30,000/$15,000 in coverage. The petition indicates that there are 3 children each receiving $5,000. The petition fails to explain why the rest of the insurance proceeds are not being distributed. The petition fails to explain that either $5,000 is an appropriate settlement amount for the wrongful death of the minor's father based upon the level of liability of the settling party or that the settling party is judgment proof beyond the policy limits.

The customary reasonable attorney's fees in a petition to compromise the minor's claim are 25% of the net settlement (gross settlement minus costs). In the current petition the attorney seeks 25% of gross. There is nothing about this case that warrants this increased fee amount.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4-29-19.
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Anthony Baeza***
Superior Court Number: 19CECG01037

Hearing Date: April 30, 2019 (Dept. 502)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny without prejudice. Petitioner must file a new petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition contains insufficient information from which the Court can determine that the settlement is in the minor's best interest. The petition indicates that the setting party had a policy with $30,000/$15,000 in coverage. The petition indicates that there are 3 children each receiving $5,000. The petition fails to explain why the rest of the insurance proceeds are not being distributed. The petition fails to explain that either $5,000 is an appropriate settlement amount for the wrongful death of the minor's father based upon the level of liability of the settling party or that the settling party is judgment proof beyond the policy limits.

The customary reasonable attorney's fees in a petition to compromise the minor's claim are 25% of the net settlement (gross settlement minus costs). In the current petition the attorney seeks 25% of gross. There is nothing about this case that warrants this increased fee amount.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4-29-19.
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Rivas v. Cal-State Builders, Inc., et al.***
Superior Court Case No. 18CECG00047

Hearing Date: April 30, 2019 (Dept. 502)

Motions: Leave to file cross-complaint (x3)

Tentative Ruling:

To grant Defendant Performance Contracting, Inc.'s motion. (Code Civ. Proc. §428.10(b).) To deny, without prejudice, Defendant JMA Concrete, Inc.'s motion. (Ibid.) To grant Defendant Cal-State, Inc.'s motion. (Ibid.)

Defendants PCI and Cal-State shall file their proposed cross-complaints within 5 days of the clerk's service of the minute order.

Explanation:

A defendant may cross-complain against a co-defendant or third person not yet a party to the action where the cause of action asserted "(1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against [it] or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against [it]." (Code Civ. Proc. §428.10(b); see also *Time for Living, Inc. v. Guy Hatfield Homes/All American Development Co*. (1991) 230 Cal.App.3d 30, 38-39.) Allowing such cross-complaints furthers the policy of avoiding a multiplicity of actions. (*Sattinger v. Newbauer* (1954) 123 Cal.App.2d 365, 369.)

Defendant Performance Contracting, Inc.

In the case at bench, Defendant PCI seeks leave to file a cross-complaint alleging express contractual indemnity, implied indemnity, breach of contract, and declaratory relief. The claims arises out of the same occurrence and set of facts as the underlying complaint, there is no apparent bad faith, there appears to be adequate time for discovery, and the motion is unopposed. Moreover, allowing the filing of the proposed cross-complaint furthers the strong judicial policy of avoiding a multiplicity of actions. Accordingly, Defendant PCI's motion is granted.

Defendant JMA Concrete, Inc.

Defendant JMA states that its proposed cross-complaint arises from the same occurrence giving rise to Plaintiff's complaint. (Ps&As, 3:26-27; Harris decl., ¶12.) Unfortunately, the proposed cross-complaint was not submitted. As the Court cannot review the proposed cross-complaint to determine whether it should be allowed (see

Code Civ. Proc. §428.10; *Glogau v. Hagan* (1951) 107 Cal.App.2d 313, 320), Defendant JMA's motion is denied without prejudice.

Defendant Cal-State Builders, Inc.

Last, Defendant Cal-State seeks leave to file a cross-complaint for indemnification, apportionment of fault, declaratory relief, and breach of contract. The claims arises out of the same occurrence and set of facts as the underlying complaint, there is no apparent bad faith, appears to be adequate time for discovery, the motion is unopposed, and allowing the cross-complaint will further the judicial policy of avoiding a multiplicity of actions. Defendant Cal-State's motion is therefore granted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4-29-19.
(Judge's initials) (Date)

(30) **Tentative Ruling**

Re: ***Bahram Shiralian v. Jon Torrence***
Court Case No. 18CECG01743

Hearing Date: April 30, 2019 (Dept. 502)

Motion: Motion for Leave to File Cross-Complaint, by: defendant Jon Torrence

Tentative Ruling:

To grant. The cross-complaint shall be filed and served within 10 days of the clerk's service of the order.

Explanation:

The law allows a defendant in a civil case to cross complain against entities not originally parties to the action if there is a sufficient subject matter connection between the action and the cross-complaint. Specifically, a defendant "may file a cross-complaint setting forth" any cause of action that either "(1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him." (Code Civ. Proc., § 428.10, subd. (b).)

Here, defendant Torrence's claims arise out of the same transaction – namely, the sale of the subject real property and the disclosures related thereto. They also involve many of the same parties. No prejudice is shown inasmuch as trial is not set until January of 2020. Most importantly, because the proposed cross-complaint arises out of the same occurrence as is the subject of the complaint herein, allowing defendant to file his cross-complaint will therefore promote judicial economy and efficiency.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4-29-19.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(19) **Tentative Ruling**

Re: ***Hedstrom v. CAP***
Superior Court Case No. 16CECG00038

Hearing Date: April 30, 2019 (Dept. 503)

Motion: By Cross-Defendant Comprehensive Addiction Program, Inc. for Attorney's Fees

Tentative Ruling:

To grant and award attorney fees in the amount of $47,230.

Explanation:

1. Right to Fees

The court in *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, discussed the definition of prevailing party under Code of Civil Procedure section 1032, and held that where one meets that definition, fees are to be awarded as a matter of right. There is no discretion to deny fees under such circumstances. (*Rancho Mirage Country Club Homeowners Ass'n. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 263.)

The arguments made by Westcare California, Inc. ("Westcare") against any fee award are unpersuasive. The fees request is made directly by Comprehensive Addiction Program, Inc. ("CAP") on a cross-complaint brought against CAP by Westcare, arising directly out of their mutual contract. The evidence argued to show that CAP has no liability for fees is not persuasive; it shows that one insurer defended CAP under a reservation of rights and the other denied coverage completely. Such reservation of rights is not an enforceable contract to defend, and the insurer is free to demand repayment. (*Michaelian v. SCIF* (1996) 50 Cal.App.4th 1093.) Westcare has not proven that CAP has no liability for the fees CAP incurred defending itself against Westcare's cross-complaint.

In addition, the fees sought here are for defending CAP against Westcare's lawsuit, not for defending against Plaintiff's claim. CAP is not seeking attorney's fees for defending against Plaintiff's action. There is no evidence that any insurer is paying CAP's fees for defending against a lawsuit for breach of the CAP/Westcare contract, which fees are the subject of this motion. No insurance policy covering contract breach disputes is presented, and the fact that an insurer was defending a suit for negligence by a person with physical injuries does not establish the existence of a policy for mere contractual breaches.

These facts also defeat the argument that CAP's liability insurer might have a claim for subrogation. Generally, contract breaches are not insurable losses in and of themselves. A liability policy covers payments due to liability to others for property damage or physical injury. Workers' compensation insurance covers claims against the employer by injured workers, not breach of contract issues. Only liability and workers' compensation policies were identified in the interrogatory answer provided. There is nothing showing even a possibility that an insurer could be subrogated to a claim for fees such as at issue here under either a liability for workers' compensation insurance policy.

Any dispute Westcare might have with CAP's workers' compensation and liability carriers is not a basis to deny CAP recovery of fees incurred defending itself against Westcare's cross-complaint. Westcare did not sue CAP for breach of the contract to name it as an additional insured; that is not an issue here. It cannot argue that a claim it might have raised in its cross-complaint (but did not) serves to eliminate the contractual attorney fees clause for those claims actually made and lost. Further, the evidence attached to the declaration of Lipke shows a 2016 acceptance of the defense of Westcare by CAP's insurer in 2016.

Westcare's argument that it was blameless and only vicariously liable does not serve to void the contractual fees' agreement. The summary judgment rulings found that Westcare could not prevail without a trial because there were triable issues of fact as to Westcare's direct liability for placing a patient with a violent past suffering from mental illness in the particular facility in question.

CAP is the prevailing party under Code of Civil Procedure section 1032 and is entitled to fees pursuant to the CAP/Westcare contract under Code of Civil Procedure section 1717.

2. Amount of Fees

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type." (*Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1133.)

> Civil Code section 1717 provides that reasonable attorney's fees shall be fixed by the court. As discussed, this requirement reflects the legislative purpose to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions. Consistent with that purpose, the trial court has broad authority to determine the amount of a reasonable fee.

(*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095 (internal citations and quotes omitted).)

The "experienced trial judge is the best judge of the value of professional services rendered in his court." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 832.) Based on a consideration of various factors, the trial court may rely on its own expertise and knowledge to calculate reasonable attorney fees. (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1507.) "When the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value." (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 300.)

The court is not limited to the affidavits submitted by the attorney. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 625.) In *PLCM Group v. Drexler*, *supra*, the California Supreme Court approved use of the reasonable hourly rate in the particular locality to fix the amount of fees; the trial court was not required to determine the in-house attorney's hourly compensation based on his salary and limit the fee to that figure.

The records show the following persons billing: Golnar Fozi ($220 per hour), Jeremy Dwork ($220 per hour), Nicolette Rozas ($195 per hour), and Daniel Modafferi ($195 per hour). Those rates are substantially lower than rates charged in Fresno by counsel of similar experience, especially in light of the quality of work done by counsel in this matter. Ms. Fozi has 25 years of experience, Mr. Dwork has 12 years, and Ms. Rozas and Mr. Modafferi each have 6 years. In this locality, a reasonable fee for Ms. Fozi and Mr. Dwork is $325 per hour, and for Ms. Rozas and Mr. Modafferi, it is $225 per hour.

The specific time spent on the tasks described is also reasonable, but for one exception—travel. There has been no showing that it was necessary to retain counsel outside of Fresno for CAP's defense. There is no evidence that attorneys in Fresno were consulted, that they refused to handle the matter, or that they were otherwise unqualified, unavailable, or unsuitable. The total of the hours incurred by the two junior attorneys, absent travel time, is 30.8 (17 travel hours excluded). At $225 per hour, this amounts to $6,930. The total of the hours incurred by the two senior attorneys, absent travel time, is 124 (37 travel hours excluded). At $325 hours, the total is $40,300.

The lodestar consists of "the number of hours reasonably expended multiplied by the reasonable hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th1084, 1095; *Ketchum v. Moses*, *supra*, 24 Cal.4th 1122, 1134.) The total recoverable amount of attorney fees for all counsel is $47,230.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/29/19.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Delao v. Lyons Magnus, Inc.***
Superior Court Case No. 16CECG02119

Hearing Date: April 30, 2019 (Dept. 503)

Motion: By plaintiff for final approval of settlement and award of attorneys' fees and costs

Tentative Ruling:

To continue the hearing to July 30, 2019, at 3:30 p.m., in Department 503. To order that class notice be redone, with such notice mailed no later than May 15, 2019, and with a response date no earlier than July 5, 2019. New papers for the continued hearing may be filed no later than July 15, 2019.

Explanation:

1. Failure of Service of Moving Papers

The proof of service omits Mr. Delao, who substituted himself in pro per in August of 2018. As a named party to this action, he must be served as any other named party.

2. Final Approval of Settlement

a. General Standards

California Rules of Court, rule 3.769(g) states: "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." Subsection (h) of rule 3.769 states: "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment."

The Manual of Complex Litigation, Fourth (Federal Judicial Center 2004), section 21.641 states:

> In evaluating the settlement, the court should take into account not only the presentations of counsel but also information from other sources, such as comments from class representatives and class members, presentations by objections, the court's own knowledge of the case obtained during pretrial proceedings, and information provided by special masters or experts appointed by the court to assess the settlement.

b. Problems with Proof of Notice

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. Procedural due process requires that affected parties be provided with the right to be heard at a meaningful time and in a meaningful manner. To accord with due process, notice provided to class members must fairly apprise the class members of the terms of the proposed compromise and of the options open to the dissenting class members. Under the California Rules of Court governing class actions, notice of the final approval hearing must be given to the class members in the manner specified by the court.

(*Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883 (internal quotes and citations omitted).)

The Court issued an order on January 8, 2019 that directed notice to be mailed by February 11, 2019. Notice was mailed on February 19, 2019. The parties apparently chose a new response date, as well, all without consulting the Court or seeking any change in the Court's orders. The Court's original order provided for 45 days of notice and added five days for the fact that notice was by mail. The choice to deviate from the Court's order may have dissuaded class members from opting out of the settlement, returning consent forms or correcting them, or filing objections, and it appears to have resulted in some forms being deemed late due to the shortened time for a response. Merely treating any "late" forms as timely will not cure the potential harm, but the Court does deem forms or opt-outs returned by this hearing date to be timely.

The party or parties responsible for the decision to make the mailing late will be responsible for the cost of the new mailing. The declaration from Simpluris for the July hearing must detail why the original mailing was done late and who picked the new response date. It must also detail the new mailing completed and all responses, and make clear how many class members had packets returned as undeliverable by the new response date. The new mailing must contain a cover sheet which states:

> The Court has ordered that this notice be mailed again to all class members. If you have previously responded, you do not need to respond again. You have until July 5, 2019 to respond if you wish to do so, or to provide correct information if you were previously notified by the Class Administrator such was needed.

Further, the Class Administration is required to file the consents to join in the claim for breach of the Federal Labor Standards Act. (See 29 U.S.C. § 216(b) ["No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."].)

c. Approval Order and Judgment

There is no proposed judgment provided. The proposed order of final approval inserts language that the Court specifically lined out in the preliminary order where the classes certified were listed. The Court in each instance made clear it certified classes of workers, not "claims."

The parties shall provide a proper order and a proposed judgment, which must not attempt to incorporate previously rejected language.

3. Attorneys' Fees and Costs

a. Selik Firm

"[C]lass counsel had the burden of proving the reasonable number of hours they devoted to the litigation, whether through declarations or redacted or unredacted timesheets or billing records. A trial court may not rubberstamp a request for attorney fees, but must determine the number of hours *reasonably* expended." (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1325 (internal citations omitted).)

Mr. Selik's declaration is improperly executed, stating the contents are true to the "best of his knowledge." That is insufficient. (*Yamada Brothers v. Agricultural Labor Relations Bd.* (1979) 99 Cal.App.3d 112, 117, fn. 1.) A properly executed declaration is required before fees are approved and must include receipts and invoices for any costs that are sought.

b. Boucher Firm

The declaration offered is not under penalty of perjury, and all information is therefore inadmissible under Code of Civil Procedure section 2015.5. (See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601.)

The Boucher firm states that it will provide billing records *in camera*. That is inappropriate. It must file billing records, although it is free to redact information subject to the attorney-client privilege or which is protected by the work product doctrine. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1328.) The presumption in California is that court records are open to the public, and that presumption is vital in a class action matter, where most of those affected are not parties to the case. California Rules of Court, rule 2.550(c), states: "Unless confidentiality is required by law, court records are presumed to be open." The lodged materials will be returned to counsel by the clerk.

The Boucher firm has provided costs information, but the entries are often vague. Actual receipts or invoices must be provided, with attorney-client or work product information redacted.

c. Mr. Majarian

Mr. Majarian's declaration is also not executed under penalty of perjury. And Mr. Majarian likewise is required to submit receipts/invoices for costs claimed.

4. Class Representative Award

As explained by the court in *Radcliffe v. Experian Information Solutions* (9th Cir. 2013) 715 F.3d 1157:

> Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. In cases where the class receives a monetary settlement, the awards are often taken from the class's recovery. Although we have approved incentive awards for class representatives in some cases, we have told district courts to scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives.
>
> Where a class representative supports the settlement and is treated equally by the settlement, the likelihood that the settlement is forwarding the class's interest to the maximum degree practically possible increases . . . But if such members of the class are provided with special "incentives" in the settlement agreement, they may be more concerned with maximizing those incentives than with judging the adequacy of the settlement as it applies to class members at large.

(*Id.* at p. 1163 (internal citations omitted).)

In *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, as here, the class representatives touted the fact that they gave general releases of all possible claims as a basis for their incentive awards (of $25,000 each in that case) and that they worked "countless hours." They also voiced a concern about the possibility of future stigma in seeking employment. The court found that it was an abuse of discretion to make such an award, but also that such awards could be appropriate under certain circumstances:

> [C]ases have reiterated that an incentive award is appropriate if it is necessary to induce an individual to participate in the suit, and have noted relevant factors to consider in deciding whether such an award is warranted. (*Cook v. Niedert* (7th Cir. 1998) 142 F. 3d 1004, 1016.) Those factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. (*Id*.) Federal district courts have identified other factors as well, including the risk to the class representative in commencing suit, both financial and otherwise, the notoriety and personal difficulties encountered by the class representative, the duration

of the litigation, and the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

(*Id.* at p. 804.)

The class representative must provide a declaration detailing the exact work she did for the class, and the number of hours it took her to complete the tasks. She also must provide information as to any actual adverse employment or other unfavorable circumstances suffered due to her acting as a class representative. Lastly, her declaration states both that she ceased employment with defendant before this case was filed and that she remained employed by defendant throughout the case. The true state of facts need be set forth.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/29/19.
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Luna v. Estate of J.M. Irigoyen***
Superior Court Case No. 14CECG02921

Hearing Date: April 30, 2019 (Dept. 503)

Motion: By Defendant and Cross-Complainant Pierto de Santis for Terminating and Monetary Sanctions Against Plaintiff Oscar Luna

Tentative Ruling:

To deny the motion.

Explanation:

Defendant moves for terminating and monetary sanctions pursuant to Code of Civil Procedure section 128.7. Defendant argues that three motions filed by Plaintiff were without legal or factual basis. These motions were Plaintiff's motions to strike Defendant's cross-complaint and his verified answer (and portions thereof), and to set aside the Court's order of August 30, 2018.

Section 128.7, subdivision (b) provides that by submitting any motion or similar paper to the Court, the submitting person is certifying that, after a reasonable inquiry:

> (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Subdivision (c) allows the Court to impose a sanction on the attorneys or parties that have violated subdivision (b) after notice and an opportunity to respond. Subdivision (c)(1) mandates that a party moving under section 128.7 must serve the motion at least 21 days before it is filed with the Court to allow the responding party to withdraw the allegedly offending motion or paper.

Here, Defendant served the papers on Plaintiff on March 6, 2019, and did not file the papers with the Court until April 3, 2019, well after the 21-day time period. In that time, Plaintiff did withdraw the motion to set aside the Court's August 30, 2018 order, leaving the motion to strike the cross-complaint and verified answer (and portions thereof). On April 4, 2019, the Court ruled on the two motions to strike, denying them both.

Defendant argues that the motions to strike were frivolous and contained legal contentions that were not warranted by existing law. In determining whether subdivision (b) is violated, the Court applies an objective test. (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440 ("A claim is objectively unreasonable if any reasonable attorney would agree [it] is totally and completely without merit." (Internal quotes omitted)).)

Defendant argues that Plaintiff's motions to strike Defendant's cross-complaint and his verified answer in its entirety were wholly without merit. Plaintiff's argument in those motions, and at issue here, was that Defendant was not authorized to file any pleadings and needed leave from the Court to file the cross-complaint and the answer pursuant to Code of Civil Procedure section 428.10, since his amended pleading asserted no substantive allegations against Defendant.

As noted in the April 4, 2019 ruling, the Court did not agree with Plaintiff's argument. The crux of the ruling was that the Court did not "read such a narrow interpretation of section 428.10 in this case to prevent [Defendant] from asserting his rights." (April 4, 2019 Order at pp. 1-2.) This applied as to both his rights to file a cross-complaint and to answer the amended pleading.

This is not to say that it was objectively unreasonable of Defendant to make such an argument. Although the Court found that Plaintiff's proposed interpretation of sections 428.10 and 430.10 was at odds with the premise that defendants should be allowed to safeguard their own rights, there is language in both sections that Plaintiff could rely on for his argument. Thus, although this Court found Plaintiff to be incorrect, it would be difficult to find Plaintiff to be objectively "unreasonable" for purposes of section 128.7.

In the papers, Defendant argues that Plaintiff has exhibited a failure to understand the indispensable party statutes and that Plaintiff's position in the motions to strike "defies basic elements of due process that even a first year law student would know about." (Reply at p. 3.) Whether or not California due process or the indispensable party statutes are part of the curriculum for first year law students is beyond the scope of this motion. Plaintiff's arguments in his motions to strike, while certainly stretching the spirit of the statute, were not objectively unreasonable.

Finally, Defendant pointd out that Plaintiff is a former attorney and notes that, when deciding whether to impose sanctions, the Court must treat Plaintiff under the "reasonable attorney" standard. (*See, e.g., Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 (the in propria persona litigant is to be held to the same rules of procedure as an attorney); *Peake, supra,* 227 Cal.App.4th at 440.) This is

undoubtedly true, but neither should the Court hold Defendant to a higher standard than such.

Furthermore, even if the Court were to find that Plaintiff's motions were objectively unreasonable, whether to impose sanctions is within the discretion of this Court. (Civ. Proc. §128.7, subd.(d).) It is also unclear if this Court has the authority to impose terminating sanctions under section 128.7. Regardless, the Court declines to impose sanctions in this instance.

For the above reasons, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/29/19.
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Tamayo v. Schulte***
Superior Court Case No. 17CECG03651

Hearing Date: April 30, 2019 (Dept. 503)

Motion: To Compel Subpoena Compliance

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

At the hearing on April 16, 2019, the Court indicated that it intended to deny the motion to compel without prejudice, as the subpoena attached to the declaration of counsel for the moving party did not have a completed proof of service. (See Church Decl., Ex. 4.) The Court continued the hearing to allow the moving party to submit supplemental documentation.

Code of Civil Procedure section 1987.1, subdivision (b) provides that any party may make a motion to direct compliance with a properly served subpoena. Here, Defendant moves to enforce compliance with a subpoena from Plaintiff to a third party. This is permitted under Code of Civil Procedure section 1987.1, subdivision (b).

In addition, the scope of the subpoena appears limited to information regarding a particular phone number for the days June 29, 2017 and June 30, 2017. The moving party has represented that this phone number is related to the decedent in this action and that the information is sought to determine if the decedent was on the phone at the time of the accident. The scope of the subpoena appears to be reasonable, and since Plaintiff, as the successor to the decedent, served the subpoena seeking the documentation, any privacy rights appear to be protected.

According to the moving party's declaration, AT&T has not produced the requested documents or responded to the subpoena. However, the subpoena attached to the first declaration of counsel for the moving party did not have a completed proof of service. (See Church Decl., Ex. 4.)

At the April 16, 2019 hearing, counsel for the moving party requested to file supplemental documentation showing a proper proof of service on AT&T. According to the declaration of Michelle Lujan, filed April 25, 2019, service was made on "Donna" at 1200 South Pine Island Road, Plantation, Florida, 33324, on November 29, 2018. (See Lujan Decl., Ex. 1.) There is nothing, however, on the proof of service to indicate that the address is the proper address for AT&T or that "Donna" is a proper individual to accept service. Moreover, the deposition subpoena purportedly served on "Donna" is not attached to the Lujan declaration.

There is a listing on the incomplete proof of service attached to counsel's original declaration suggesting that this is the address for "AT&T Corp." (See Church Decl., Ex. 4, p. 1.) But that same declaration of counsel includes another subpoena directed to AT&T (which is unsigned by counsel) that lists an address in Dallas, Texas for the "AT&T Subpoena Center." (See Church Decl., Ex. 2.) AT&T's purported response to that subpoena lists yet a third address for AT&T in North Palm Beach, Florida. (See Church Decl., Ex. 3.) The motion to compel was served on all three addresses. (See Proof of Service, filed March 14, 2019.)

In addition, although counsel's original declaration states that "[d]eclarant requested to be provided a copy of the documents produced pursuant to said subpoena," no written confirmation supports that statement. This deficiency has not been addressed in the supplemental filing.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/29/19.
(Judge's initials) (Date)